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No. 87-2057

In the Supreme Court of the United States

OCTOBER TERM, 1988

GEOFFREY B. SMITH, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a Postal Service messenger who opened an express mail package in the course of a theft for personal gain conducted a government search that should result in the exclusion of the evidence that was retained when the messenger confessed his theft and turned the evidence over to law enforcement officials.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 810 F.2d 996.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1988. A petition for rehearing was denied on April 15, 1988 (Pet. App. A7). The petition for a writ of certiorari was filed on June 13, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner entered a conditional plea of guilty in the United States District Court for the District of Kansas to charges of conspiracy to possess and distribute cocaine, in violation of 21 U.S.C. 846, and possession and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1). He

was sentenced to concurrent terms of five years' imprisonment and to a special parole term of six years. The court of appeals affirmed (Pet. App. A1-A6).

The evidence at the suppression hearing established that petitioner used the United States Postal Service's express mail service to send a package from Fort Lauderdale, Florida, to an individual in Wichita, Kansas. The Postal Service messenger in Wichita, who suspected that the package might contain drugs, failed to complete the delivery. Instead, he stole the parcel. Upon opening it, the messenger discovered that it contained approximately two ounces of cocaine. He used some of the drug but ultimately contacted an attorney and turned the package over to the Federal Bureau of Investigation (FBI). The FBI agents replaced the cocaine with imitation contraband and arranged for the Postal Service to complete the delivery. The agents subsequently arrested petitioner and the recipient, who were each indicted on various drug charges. Pet. App. 2a.

The district court denied petitioner's motion to suppress the cocaine, holding that the messenger's actions did not constitute a government search (Pet. App. A8-A12). The court found that the messenger had opened the package in the course of committing a theft for "his own personal gain" (*id.* at A9), that his action had been "unauthorized" and "unlicensed" (*ibid.*), and that he had acted "outside of the scope of his conduct as a government agent" (*ibid.*). The court of appeals affirmed (*id.* at A1-A6). Citing the familiar common law principle that an employee "is not acting as his employer's agent when he acts outside the scope of the employment" (*id.* at A3), the court observed that the messenger "was not acting as a governmental agent or to further a governmental objective, but rather, as a private individual" (*id.* at A5). Accordingly, the court

held, "there was no governmental search or seizure within the intendment of the fourth amendment" (*ibid.*).

ARGUMENT

Petitioner contends (Pet. 7-10) that the Postal Service messenger's opening of the package in the course of committing a theft for his own personal gain constituted a government search subject to the Fourth Amendment's limitations. The court of appeals properly rejected that contention. Even if the messenger's acts amounted to a government search, the exclusionary rule would not require a court to suppress the contents of the package at trial. The factual situation in this case, which the district court characterized as "unprecedented" (Pet. App. A11), is highly unusual and unlikely to recur. The court of appeals' decision does not conflict with any decision of this Court, another court of appeals or, to our knowledge, any other court. Further review accordingly is not warranted.

The Fourth Amendment's guarantee against "unreasonable searches and seizures" imposes restraints upon " 'governmental action'—that is, 'upon the activities of sovereign authority.' " *New Jersey* v. *T.L.O.*, 469 U.S. 325, 335 (1985) (quoting *Burdeau* v. *McDowell*, 256 U.S. 465, 475 (1921)). The messenger's act of opening a parcel in the course of committing a theft was not governmental action. The Postal Service did not approve of, or even know of, the messenger's illicit activity. As the court of appeals explained, the messenger's action "was not part of the messenger's duties as a Postal employee, was not done to further any governmental objective, but was done solely for the messenger's personal use" (Pet. App. A4-A5). Indeed, the government's and the messenger's interests were diametrically at odds. The messenger's theft of the mail

prevented the accomplishment of the specific governmental function—postal delivery—that the messenger was hired to perform. The messenger not only acted strictly out of self-interest and contrary to the government's own interests, but he also opened the package without claim or color of sovereign authority. A Postal Service employee who clandestinely opens the mail without claim of right for the sole objective of converting contraband to his own use cannot be described in any meaningful sense as engaged in the "activities of sovereign authority" (*T.L.O.*, 469 U.S. at 335).

Even if the messenger's acts were treated as governmental action, the exclusionary rule would not require the courts to suppress the evidence obtained when the messenger turned himself in to law enforcement officials. The exclusionary rule "operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.' " *United States* v. *Leon*, 468 U.S. 897, 906 (1984) (quoting *United States* v. *Calandra*, 414 U.S. 338, 348 (1974)). The rule's application has therefore been limited to those circumstances in which it "pay[s] its way" by deterring official misconduct (*Leon*, 468 U.S. at 908 n.6). Accordingly, if the exclusionary rule " 'does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted' " (*id.* at 909, quoting *United States* v. *Janis*, 428 U.S. 433, 454 (1976)). There is no reason to believe that suppression of the evidence in this case would deter in any way the type of misconduct that occurred here. Plainly, a Postal Service messenger who contemplates theft of a parcel for personal gain would not be deterred by the possibility that, if he steals the package, discovers that it contains contraband, and is apprehended or confesses his

crime, the contents of the parcel will be suppressed at the sender's or addressee's trial.

Petitioner's contention (Pet. 10) that the court of appeals' decision in this case will lead to "the most flagrant violations of the Fourth Amendment" is groundless. As we have noted, the factual pattern presented in this case is exceedingly unusual, and even if the same facts were to arise more commonly, it is highly unlikely that a ruling either to suppress evidence obtained in this manner or to admit it at trial would have any effect on the frequency of thefts by Postal Service employees. Accordingly, absent a conflict among the circuits and some basis for believing that the question here would present a matter of recurring importance, there is no occasion for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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